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IN THE

Supreme Court of the United States

October Term, 1966

No. 380

RAFAEL H. LOPEZ, *Petitioner*

v.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PAGE

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Regulations Involved	3
Definitions	3
Time for filing petition	4
Venue	4
Statement of the Case	7
Argument	11
Conclusion	11
Appendix A—Opinion of the Court	12
Appendix B—Judgment	13

TABLE OF CITATIONS

Cases:

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963)	11
Giora v. Rosenberg, 379 U.S. 18 (1964)	11

Statutes:

Immigration and Nationality Act—	
Section 101—8 U.S.C. 1101(a)(15)(j)	3, 4
Section 106—8 U.S.C. Supp. V-1105a	3

TABLE OF CITATIONS—*(Continued)*

Statutes: Page

Section 106(a)—5 U.S.C. 1031 4

Section 106(a)—8 U.S.C. 1105a (a) 2

Section 212(e)—8 U.S.C. 1182(e) 4

Code of Federal Regulations—

Part 3 of Title 8 5

Section 242 of Title 8 5

Section 242.8 5

Section 242.20 6

Section 242.22 ..... 6, 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Rafael H. Lopez, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 16, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 356 F. 2d 986, and is reproduced in Appendix A, *infra*, page 12, and the judgment entered by the Court of Appeals is reproduced in Appendix B, *infra*, page 13.

The opinion and order of the special inquiry officer, denying the petition to reopen the order of deportation, is reproduced in the appendix printed for the use of the court below at page 13a, and his opinion and order denying the petition for reconsideration is reproduced in said appendix at page 16a.

The opinion and order of the Board of Immigration Appeals is reproduced in the appendix printed for the use of the court below at page 18a.

Nine copies of the aforesaid appendix printed for the use of the court below have been filed with this petition pursuant to Rule 23(i).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 16, 1966; on April 13, 1966, petitioner filed a timely petition for a rehearing, which was denied on April 27, 1966, and this petition for certiorari has been filed within ninety days of the date of the order denying the petition for a rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 106(a) of the Immigration Act (8 U.S.C. 1105a(a)) vesting in the courts of appeals exclusive jurisdiction to review "all final orders of deportation" applies to an order of the Board of Immigration Appeals dismissing a timely appeal from an order of a special inquiry officer, dated February 5, 1965, denying a motion to reconsider and reopen an order of deportation, entered July 17, 1962.

2. If a nonimmigrant grant exchange visitor to the United States applies for a waiver of the statutory two-year foreign residence requirement against his own best judgment, and solely because an immigration officer advised and urged him to do so, may the visitor be ordered deported solely on the ground that he made the application for the waiver?

STATUTE AND REGULATIONS INVOLVED

1. Section 101 of the Immigration and Nationality Act, as amended, (-8 U.S.C. 1101 (a) (15) (j)-) in pertinent part provides;

Definitions

(a) As used in this chapter

. . . . . .

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

. . . . . .

(j) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him. . . .

2. Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, 75 Stat. 651 (8 U.S.C.-Supp. V-1105a), in pertinent part provides:

Judicial Review of Orders of Deportation and Exclusion— Exclusiveness of Procedure

Sec. 106(a). The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended

(64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

Time for filing petition

(1) A petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

Venue

(2) The venue for any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted . . .

3. Section 212(e) of the Immigration and Nationality Act, as amended (-8 U.S.C. 1182(e)-) provides:

> General Classes of Aliens Ineligible to Receive Visas and Excluded from Admission; Waivers of Inadmissibility.

(e) No person admitted under section 1101 (a) (15) (j) of this title or acquiring such status after admission shall be eligible to apply . . . for permanent residence . . . until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States. *Provided*, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of

the Commissioner of Immigration and Nationalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States . . .), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest . . .

4. Part 3 and 242 of Title 8 of the Code of Federal Regulations in pertinent part provide:

Part 3. Board of Immigration Appeals.

(b) *Appellate Jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

. . . . . .

(2) Decisions of special inquiry officers in deportation cases . . .

. . . . . .

(d) *Powers of the Board*

. . . . . .

(2) *Finality of Decision.* The decision of the Board shall be final except in those cases received by the Attorney General . . .

Part 242—Proceedings to Determine Deportability of Aliens in the United States; Apprehension, Custody, Hearing and Appeal.

Sec. 242.8 — *Special Inquiry Officers* — (a) *Authority.* In a proceeding conducted under this part, the special inquiry officer shall have the authority to determine deportability and to make decisions including orders of deportation . . . to suspend deportation and authorize voluntary departure . . .

Sec. 242.20 — *Finality of Order.* The order of the special inquiry officer shall be final except when . . . an appeal is taken to the Board of Immigration Appeals by the respondent or by the examining officer.

Sec. 242.22 — *Reopening or Reconsideration*

. . . The special inquiry officer may upon his own motion, or upon the motion of the trial attorney or the respondent, reopen or reconsider any case in which he has made a decision unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. A motion to reopen will not be granted unless the special inquiry officer is satisfied that the evidence sought to be offered is material and was not available and could not have been described or presented at the hearing . . .

STATEMENT OF THE CASE

Petitioner is a native and citizen of the Philippine Republic. He is the holder of a university degree of doctor of medicine, and is a specialist in the study and treatment of cardiovascular diseases. He is now thirty-four years of age (4a).[1]

On August 26, 1958, petitioner entered the United States as a nonimmigrant exchange visitor, authorized to remain in the United States in that capacity until July 30, 1962 (1a).

Admittedly, petitioner ". . . is engaged in highly specialized and extremely valuable work in the field of cardiovascular disease (and he) is the recipient of special grants, at least one of which was accorded to him by the United States Public Health Service as his stipend to afford him an opportunity to continue in the highly specialized and extremely valuable research being conducted by him." (6a).

At one time petitioner was granted a special license to practice medicine by the State Board of Medical Education and Licensure of the Commonwealth of Pennsylvania (6a).

Petitioner is married and is the father of two children, both of whom were born in the United States, approximately 6 and 4½ years ago (5a).

Petitioner has resided continuously in the United States since his admission on August 26, 1958, as aforesaid (4a).

On January 30, 1962, Congressman Francis E. Walter, M. D., introduced in the Congress of the United States a private bill for the purpose of obtaining for petitioner the status of a permanent resident (18a).

On May 3, 1962, Mr. Robert Lea, an officer of the Immigration and Naturalization Service, notified petitioner to appear for an interview at his office on May 6, 1962 (9a).

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[1] The references are to the appendix which was printed for the use of the court below, nine copies of which have been filed with this petition.

On May 6, 1962, said Officer Robert Lea informed petitioner, in substance and effect, that because of the introduction of said private bill petitioner should forthwith sign and file an application for a waiver of the two-year foreign residence requirement of Section 212(e) of the Immigration and Nationality Act, because, in the absence of such an application, petitioner could be, and almost certainly would be, immediately deported on the theory that by agreeing to the introduction of the aforesaid private bill, petitioner had lost his status of an exchange visitor (10a), whereas if petitioner filed the application he would probably be permitted to reside permanently in the United States (11a).

Petitioner advised Officer Lea that he had been advised by Congressman Walter never to sign a waiver application (10a, 11a) but Officer Lea continued to urge petitioner to do so with the result that after hesitating for several days petitioner finally signed and filed the application on May 8, 1962 (11a, 12a).

On June 27, 1962, the Immigration and Naturalization Service commenced deportation proceedings against petitioner solely on the ground that petitioner had lost his status of an exchange visitor by filing the said application for waiver of the foreign residence requirement, as aforesaid (1a).

On July 17, 1962, a hearing was held before Special Inquiry Officer Daniel J. Schrull, and on the same day the said Officer entered an order providing, inter alia, that petitioner ". . . shall be deported from the United States to the Philippine Island" on the sole ground of the admitted fact that the petitioner had applied for a waiver of the two-year foreign residence requirement, as aforestated (4a, 7a).

The attorney who represented petitioner at that time stated that he would appeal to the Board of Immigration Appeals, but he failed and neglected to do so, in consequence of which no appeal was taken at that time (4a).

Following the entry of the aforesaid deportation order, petitioner's right to remain in the United States was extended from time to time (21a).

Over two years later, to wit, on October 12, 1964, a warrant for petitioner's deportation was issued (21a).

On January 7, 1965, petitioner, represented by new counsel, filed a Petition to reopen the proceedings, and to allow a rehearing on the ground that petitioner had been induced, and practically compelled, by Officer Robert Lea to take the step which led to his being ordered deported, viz., the step of applying for a waiver of the two-year foreign residence requirement. This Petition was supported by an affidavit in which petitioner set forth in detail the misleading and deceptive statements made by said Officer Robert Lea (8a, et seq.).

Notwithstanding that none of the allegations contained in the above-mentioned affidavit were ever denied, either by Officer Robert Lea or any other person, the Special Inquiry Officer, on January 11, 1965, entered an order denying petitioner's request to reopen the proceedings on the ground that petitioner's allegations could have been presented at the original deportation hearing (4a, et seq.).

On January 25, 1965, petitioner filed a motion for reconsideration of the order of January 11, 1965, which motion was denied by the Special Inquiry Officer by an order dated February 5, 1965 (16a).

From the abovementioned order of February 5, 1965, petitioner duly filed a timely appeal to the Board of Immigration Appeals, which Board, on May 14, 1965, entered an order "that the appeal be dismissed" (22a) on the ground that the facts relied on by petitioner "could have been discovered or presented . . . at the deportation hearing held on July 17, 1962" (20a).

Thereafter petitioner timely appealed to the United States Court of Appeals for the Third Circuit, and on March 16, 1966, that court rendered an opinion affirming the order entered February 5, 1965, by the special inquiry officer, and refusing to review the order of deportation on the ground of "want of jurisdiction".

The judgment entered by the Court of Appeals is quoted below:

> "This cause came on to be heard on the record from the Board of Immigration Appeals, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered and adjudged by this Court that the order of February 5, 1965 which denied a motion for reconsideration of the deportation order be, and the same is hereby affirmed; the petition for review of the order of deportation be, and the same is hereby denied for want of jurisdiction."

ARGUMENT

Although in one part of its opinion the court below stated that "we cannot say that the (special inquiry officer's) denial of reconsideration was an abuse of discretion" (page 12, *infra*), it is clear from the court's short opinion, taken as a whole, and from the court's formal judgment (page 13, *infra*), that the court declined to review the order of deportation entered against petitioner on the ground of the court's alleged "want of jurisdiction".

By refusing to exercise jurisdiction in this case, it is submitted, the court has laid the ground work for that bifurcation of judicial review in deportation cases that the 1961 addition to the Immigration and Nationality Act was designed to prevent: *Foti v. Immigration and Naturalization Service*, 375 U. S. 217 (1963); *Giora v. Rosenberg*, 379 U. S. 18 (1964).

Apparently the court below overlooked the fact that the Code of Federal Regulations (sec. 242.22) provides, in substance and effect, that a special inquiry officer may entertain a motion to reopen or reconsider his order at any time prior to the taking of an appeal to the Board of Immigration Appeals.

It is in the public interest, as well as the petitioner's interest, that petitioner's rights be settled in this proceeding rather than in new proceeding in either the Court of Appeals or the District Court.

CONCLUSION

For the foregoing reasons the prayer of this petition for issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

FRANCIS T. ANDERSON
Attorney for Petitioner

APPENDIX A

Opinion of the Court

(Filed March 16, 1966)

Per Curiam:

Upon its face this appeal is a petition to review an order of deportation filed more than two years after that order became final. Our jurisdiction is limited to review upon petitions "filed not later than six months from the date of the final deportation order. . . ." 8 U.S.C. §1105(a)(1). Therefore, on its face the petition asks that we exceed our statutory authority.

However, the record also shows that more than six months after the filing of the final order of deportation the petitioner filed a motion to reconsider the deportation order. A hearing was granted upon that motion and the motion was denied less than six months before this petition for review was filed. Therefore, we also consider this petition as one for review of the denial of reconsideration.

It appears that nothing was presented or urged by the petitioner in support of his motion for reconsideration that was not known and available to him at the hearing which resulted in the order of deportation. All of the circumstances considered, we cannot say that the denial of reconsideration was an abuse of discretion.

This order denying the motion for reconsideration will be affirmed.

APPENDIX B

Judgment

Present: HASTIE and SMITH, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

This cause came on to be heard on the record from the Board of Immigration Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of February 5, 1965 which denied a motion for reconsideration of the deportation order be, and the same is hereby affirmed; the petition for review of the order of deportation be, and the same is hereby denied for want of jurisdiction.